

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO
3
4

RAFAEL ARROYO,

Plaintiff,

v.

STRUCTURAL STEEL WORKS, INC.,

Defendant.

Civil No. 12-1664 (JAF)

5
6 **OPINION AND ORDER**

7 We must decide whether an employee's evidence of retaliation is sufficient to
8 withstand his employer's motion for summary judgment in this case brought under the
9 Age Discrimination in Employment Act. Having found that the claim is unsubstantiated,
10 the court grants summary judgment to Defendant.

11 **I.**

12 **Background**

13 Because we must view all facts in the light most favorable to the non-moving
14 party when considering a summary judgment motion, to the extent that any facts are
15 disputed, the facts set forth below represent Plaintiff's version of the events at issue.
16 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However,
17 where Plaintiff's asserted facts do not properly comply with Local Rule 56(c) and (e), we
18 deem Defendant's properly-supported statements as admitted. See Cosme-Rosado v.
19 Serrano-Rodriguez, 360 F.3d 42, 45 (1st Cir. 2004) (affirming district court's decision to

1 deem moving party's statements of facts admitted if opposing party fails to controvert
2 properly).

3 Plaintiff Rafael Arroyo-Moret ("Arroyo") was an employee of Defendant
4 Structural Steel, a corporation engaged in the sale of steel and construction materials. At
5 the time of his leaving, Arroyo was sixty-nine years of age. (Docket No. 13-2 at 1-2.)
6 Arroyo was hired in 2006 by Maricarmen Aguayo, the Vice-President and person who
7 oversees the company's sales division. (Docket No. 13-2 at 1-2.) As an "inside
8 salesman" Arroyo received and processed purchase orders; prepared price estimates;
9 prepared sales orders; and prepared cut orders (specifying the dimensions of materials to
10 be cut). (Docket No. 13-2 at 4-5.) In January 2007 and January 2008, Arroyo received
11 salary increases. (Docket No. 13-2 at 6.) Then, at some point before May 2008, Plaintiff
12 filed a "Complaint" against Structural Steel for failure to pay his overtime wages. The
13 information about this complaint is vague, lacking a date or a venue, but the court gathers
14 that it was an internal claim.¹

15 After Arroyo's overtime complaint, the sales manager sent two memoranda in
16 2008 instructing Arroyo to arrive at work at 7:00 am and to leave at 5:00 pm so that he
17 did not incur additional overtime. (Docket No. 13-2 at 3, 6-7.)

18 Arroyo received a disciplinary memorandum after he failed to follow company
19 protocol for verifying checks and accepted one that had been stolen. (Docket No. 13-2 at
20 8.)

¹ The court reminds both parties to be clear in their presentation of relevant facts. Because connotations can be lost in the English translations, it is especially important to specify the nature of claims and where they were filed.

1 Arroyo made thirty-three mistakes in sales orders between April and December
2 2009, and he received two more written warnings. (Docket No. 13-2 at 9-10.) Arroyo
3 made one-hundred and fifty mistakes in sales orders in 2010 and 2011. He was told in a
4 September 2011 meeting that he must improve, and he received a written memorandum
5 of warning. (Docket No. 13-2 at 12-14.) By October 2011, Arroyo had committed
6 fourteen additional errors. At that time, Aguayo blocked Arroyo's access to the computer
7 program for sales orders. (Docket No. 13-2 at 14-15.) Aguayo asked Arroyo to resign
8 because of his errors; asked Arroyo why he did not retire; and stated that no person of his
9 age had ever worked for the company before. (Docket No. 13-2 at 15-16).

10 On November 7, 2011, Arroyo filed a discrimination charge against Structural
11 Steel in the Antidiscrimination Unit of the Puerto Rico Department of Labor (ADU).
12 (Docket No. 13-2 at 17.) On November 22, 2011, Arroyo was given a disciplinary
13 memorandum for starting work one hour before his assigned shift. (Docket No. 13-2 at
14 17.) On December 7, 2011, Arroyo received another disciplinary memorandum after
15 several employees complained that he repeatedly asked them about their hours and
16 compensation and after an employee overheard him telling a client about his problems
17 with the company. (Docket No. 13-2 at 18-20.) In December 2011, several employees
18 reported seeing Arroyo sleeping at his desk with his head down, eyes closed, snoring, and
19 they took pictures of this on January 17 and 18, 2012. (Docket No. 13-2 at 21-22.) In
20 consideration of these reports and pictures, and of Arroyo's prior disciplinary history,
21 Aguayo terminated Arroyo on January 18, 2012. (Docket No. 13-2 at 23-25.) At this
22 point in time, Arroyo was about seventy-five years old.

1 Arroyo did submit a statement of additional facts in this case. (Docket No. 26.)
2 However, he failed to provide record citations, as required by Local Rule 56(c) and (e).
3 We also remind Arroyo's attorney that, per Local Rule 5(g), "documents not in the
4 English language which are presented or filed, whether as evidence or otherwise, must be
5 accompanied by a certified translation into English." Finally, we remind the party not to
6 mistake the record.²

7 Arroyo filed this case on August 13, 2012. (Docket No. 1.) Structural Steel filed
8 a motion for summary judgment on May 8, 2013. (Docket No. 13.) On August 08, 2013,
9 both parties filed a Joint Proposed Pretrial Order, which restated their allegations and
10 proposed witness and exhibit lists. (Docket No. 34.)

11 II.

12 Legal Standard

13 Structural Steel is entitled to summary judgment on a claim if it can show that
14 there is no genuine dispute over the material facts underlying the claim. Celotex Corp. v.
15 Catrett, 477 U.S. 317, 323 (1986). We must decide whether a reasonable jury could find
16 for Arroyo in any of his claims when all reasonable inferences from the evidence are
17 drawn in his favor. See Scott v. Harris, 550 U.S. 372, 380 (2007).

² Arroyo's brief states that "Ortiz testified that everybody in the Company knew" that Arroyo had "an eye condition (cataracts and retina perforation)." (Docket No. 26 at 2.) Yet, Ortiz's deposition states only that she knew Arroyo had "cancer" and that "not everyone knew about it." (Docket No. 13-40 at 30-31, translation at Docket No. 22-4.) This is a blatant misstatement of the record.

1 **III.**

2 **Discussion**

3 The Age Discrimination in Employment Act (ADEA) prohibits an employer from
4 discriminating against any individual “because of such individual’s age.” See 29 U.S.C.
5 §§ 621-634. In addition, an employer cannot retaliate against an individual for opposing
6 such discrimination. See 29 U.S.C. § 623(d) (“It shall be unlawful for an employer to
7 discriminate against any of his employees ... because such individual ... made a charge
8 ... under this chapter”); See, e.g., Ramirez Rodriguez v. Boehringer Ingelheim 425 F.3d
9 67, 84 (1st Cir. 2005).

10 On November 7, 2011, shortly before the current case, Arroyo filed an age-based
11 discrimination charge against Structural Steel in the Antidiscrimination Unit of the Puerto
12 Rico Department of Labor. (Docket No. 13-2 at 17.) Arroyo now asserts that he was
13 terminated in retaliation for that filing, and that his termination, therefore, violates both
14 federal law and Puerto Rico law. Arroyo’s claims are unsubstantiated.

15 Here, neither party alleges that there is direct evidence of retaliation. Where there
16 is no direct evidence of retaliation our analysis of a claim should follow the burden-
17 shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S 792, 802-05
18 (1973). See Mesnick v. General Elec. Co. 950 F.2d 816, 827 (1st Cir. 2005). Arroyo
19 must first make a *prima-facie* showing of discrimination by showing that (i) he engaged
20 in ADEA-protected conduct, (ii) he was thereafter subjected to an adverse employment
21 action, and (iii) a causal connection exists between the protected conduct and the adverse
22 action. Id. Structural Steel concedes that Arroyo was engaged in ADEA-protected

1 conduct and that he was thereafter subjected to an adverse employment action. (Docket
2 No. 13-1 at 23.) Therefore, the only issue in establishing Arroyo's *prima-facie* case is
3 whether there is a causal connection between his ADEA-protected conduct and his
4 termination.

5 If Arroyo makes a *prima-facie* showing of retaliation, then "the burden shifts to
6 the defendant to articulate a legitimate, nondiscriminatory reason for its employment
7 decision." Id. If Structural Steel articulates such a reason, then Arroyo must show that
8 Structural Steel's reason is "a pretext masking retaliation for the employee's opposition
9 to a practice cast into doubt by the ADEA." Id. The "critical inquiry becomes whether
10 the aggregate evidence of pretext and retaliatory animus suffices to make out a jury
11 question." Id.

12 First, we must determine whether a reasonable jury could find a causal connection
13 between the protected conduct and the adverse employment action. If Arroyo survives
14 that threshold question, then we must decide whether a reasonable jury could find that
15 Structural Steel's reason is a mere pretext for retaliation.

16 **A. Causal Connection between Protected Conduct and Adverse Employment**
17 **Action**
18

19 Arroyo has not established a *prima-facie* case of retaliation, because he presented
20 no evidence that there was a causal connection between his ADEA-protected conduct and
21 the adverse employment action. Mesnick, 950 F.2d at 827 (stating that showing a causal
22 connection is a necessary third element of a *prima-facie* case of retaliation). Arroyo
23 foreclosed this line of argument during his deposition, when he testified that he had no

1 facts to establish such connection. (Docket No. 13- at 23-24.) He responded to the issue
2 clearly and directly:

3 Q. What I want to know is if you have any fact that you may
4 make reference to for you to allege that your dismissal was
5 also due to that, to filing the charge.

6
7 A. Correct, correct.

8
9 Q. Do you have any fact to establish a connection between both
10 or not?

11
12 A. No.

13
14 (Docket No. 22-1 at 123) (underlining ours). Arroyo buttresses his claim by alleging that
15 he committed no errors in November or December 2011. (Docket No. 24 at 5.)
16 However, Arroyo admitted that after October, he was blocked from preparing electronic
17 sales orders. (Docket No. 13-2 at 15, Docket No. 25 at 4.) Therefore, if blocked, there is
18 no basis for his argument that he worked on electronic sales orders without errors during
19 this time period.

20 Arroyo was terminated two months and eleven days after he filed an
21 antidiscrimination charge. (Docket No. 13-2 at 17-24.) He alleges that the termination,
22 coupled with the temporal proximity to the protected conduct, satisfies his burden to
23 show causation. (Docket No. 24 at 6.) However, “[t]he fact that he was terminated,
24 rather than merely reprimanded, two months after filing an ADU complaint does not
25 establish that the termination was causally linked to the complaint.” Ramirez Rodriguez,
26 425 F.3d at 85. Further, “chronological proximity does not by itself establish causality,
27 particularly if ‘[t]he larger picture undercuts any claim of causation.’” Wright v.

1 CompUSA, Inc., 352 F.3d 472, 478 (1st Cir. 2003) (quoting Soileau v. Guilford of Maine,
2 Inc. 105 F.3d 12, 16 (1st Cir. 1997)). Here, Arroyo admitted that he was disciplined in
3 writing four times before filing his discrimination charge and was disciplined in writing
4 twice after filing the charge. (Docket No. 13-2 at 14-18; Docket No. 25 at 3-4.) This
5 presents a clear pattern preceding any retaliatory motive. Neither did Arroyo show that
6 Structural Steel disciplined him more harshly than other employees. Arroyo fails to
7 establish a causal link and, therefore, fails to establish a triable issue of fact regarding
8 retaliation.

9 **B. Evidence of Pretext**

10 Even assuming *arguendo* that Arroyo had provided evidence of a causal link and
11 had, therefore, proven his *prima-facie* case, Structural Steel articulated a legitimate non-
12 discriminatory reason for its employment decision. Therefore, “the ultimate burden falls
13 on the plaintiff to show that the employer’s proffered reason is a pretext masking
14 retaliation for the employee’s opposition to a practice cast into doubt by the ADEA.”
15 Mesnick, 950 F.2d at 827. At this stage, we must consider the evidence “as a whole,”
16 and determine “whether the aggregate evidence of pretext and retaliatory animus suffices
17 to make out a jury question.” Id.

18 To show that Structural Steel’s reasons were pretextual, Arroyo argues that: There
19 was close temporal proximity between the protected action and the adverse employment
20 action; there are no contemporaneous records concerning the complaints; Structural Steel
21 failed to implement progressive discipline; the credibility of Structural Steel’s witnesses
22 is in question; there was a reliance on subjective criterion; and Arroyo previously

1 received salary increases. Looking at this evidence individually or together, nothing
2 suggests that Structural Steel's stated reasons were pretextual. The record contains no
3 evidence "from which a reasonable jury could infer that the employer retaliated against
4 him for engaging in ADEA-protected activity." Mesnick, 950 F.2d at 828.

5 **1. Temporal Proximity**

6 We discussed this factor at length in the previous section. As we noted,
7 "chronological proximity does not by itself establish causality, particularly if '[t]he larger
8 picture undercuts any claim of causation.'" Wright v. CompUSA, Inc., 352 F.3d 472,
9 478 (1st Cir. 2003) (quoting Soileau v. Guilford of Maine, Inc. 105 F.3d 12, 16 (1st Cir.
10 1997)). The fact that Arroyo was terminated after he filed a claim "rather than before it
11 does not, standing alone, establish a causal connection between the ADU complaint and
12 the termination." Ramirez Rodriguez v. Boehringer Ingelheim Pharmaceuticals, Inc., 425
13 F.3d 67, 85 (1st Cir. 2005)

14 **2. Contemporaneous Records of Complaints**

15 Arroyo claims that there is no contemporaneous documentation of complaints
16 against him, and from this assertion he infers pretext. (Docket No. 24 at 8.) However,
17 Arroyo admits that shortly after filing his ADU complaint on November 7, 2011, he
18 received a disciplinary memorandum on November 22, 2011, for failing to comply with
19 his work schedule. (Docket No. 13-2 at 17-18; Docket No. 25 at 4.) Arroyo also
20 admitted that he received another disciplinary memorandum on December 7, 2011.
21 (Docket No. 13-2 at 21; Docket No. 25 at 6.) These admissions suffice to show
22 contemporaneous records of complaints.

1 **3. Progressive Discipline**

2 Before filing his ADU claim, Arroyo received oral warnings and four written
3 disciplinary memoranda, but was always given opportunities to improve his performance.
4 (Docket No. 13-2 at 7-17; Docket No. 25 at 2-4.) After filing his antidiscrimination
5 claim, Arroyo received two disciplinary memoranda: The first for not following his
6 working hours and the second for “harassing” his coworkers and telling clients about his
7 problems with the company. (Docket No. 13-2 at 17-21; Docket No. 25 at 4-6.)
8 However, Arroyo claims that because he was not afforded the opportunity to correct his
9 behavior once he was reported to have slept on the job, the company’s reasons for his
10 termination were mere pretext for a retaliatory motive. (Docket No. 24 at 9.) Arroyo’s
11 termination was not inconsistent with company policy, and he has not provided evidence
12 that other employees were subjected to less severe discipline for similar conduct. The
13 fact that Arroyo was terminated, rather than merely disciplined, two months after filing a
14 discrimination complaint does not establish that the termination was retaliatory. See
15 Ramirez Rodriguez, 425 F.3d at 85-86.

16 **4. Credibility of Defendant’s Witnesses**

17 Arroyo claims that because all of Structural Steel’s affiants work for the company,
18 their affidavits should be shielded from consideration. (Docket No. 24 at 9-10.)
19 However, case law holds that a witness’ connection to the plaintiff’s employer does not
20 discredit the testimony of such witness in a case of workplace discrimination or
21 retaliation. Ronda-Perez, 404 F.3d at 45-46.

1 Arroyo also claims that we should move to trial to determine whether he was
2 sleeping on the job. (Docket No. 24 at 10.) This claim lacks support.

3 First, Arroyo failed to properly deny the allegation that he was sleeping and
4 snoring on the job, a fact that was apparently photographed through the use of a mobile
5 phone camera. (Docket No. 25 at 6-7.) Arroyo failed to comply with Local Rule 56(c),
6 which requires “a party opposing a motion for summary judgment to accept, deny, or
7 qualify each entry in the movant’s statement of material facts paragraph by paragraph and
8 to support any denials, qualifications, or new assertions by particularized citations to the
9 record.” Cabán Hernández v. Philip Morris USA, Inc., 486 F.3d 1, 6-7 (1st Cir. 2007). If
10 the non-movant fails to comply with Local Rule 56, “the rule permits the district court to
11 treat the moving party’s statement of facts as uncontested.” Alsina-Ortiz v. Laboy, 400
12 F.3d 77, 80 (1st Cir. 2005).

13 Second, even if Arroyo had properly denied the allegation that he has sleeping and
14 snoring, the question is not whether his version is true, but whether his supervisor
15 “believed what [she] had been told by the employees [she] interviewed.” Ronda-Perez v.
16 Banco Bilbao Vizcaya Argentaria -- Puerto Rico, 404 F.3d 42, 45 (1st Cir. 2005) (stating
17 also that “Plaintiff’s plea that his denials establish triable issues of fact foreclosing
18 summary judgment would, if accepted, spell the end of summary judgment”). Again,
19 Arroyo failed to follow Rule 56 in any of his denials. (Docket No. 25 at 6-7.) His
20 additional statement of facts references testimony that is not in evidence. (Docket
21 No. 26.) (Local Rule 5(g)).

1 **5. Subjective Criterion**

2 Arroyo claims that we should move to trial because Structural Steel relied on
3 subjective criteria and “trivial issues” in its termination decision. (Docket No. 24 at 11.)
4 Arroyo cites a leading case from the Eight Circuit, wherein the allegation that a plaintiff
5 “did poorly on the interview” was subjective and required a denial of summary judgment.
6 Widoe v. District No. 111 Otoe County School, 147 F.3d 726, 730 (8th Cir. 1998).
7 Arroyo fails to advance an argument explaining why testimony from his coworkers that
8 he had snored at his desk and their accompanying pictures, together with his history of
9 disciplinary memoranda, are overly subjective criteria for a personnel decision. (See
10 Docket No. 13-2 at 21-23.)

11 **6. Salary Increases**

12 Arroyo infers pretext from the admitted fact that he received salary increases in
13 January 2007 and January 2008. (Docket No. 24 at 13.) Arroyo, however, does not
14 explain why salary increases four and five years before his termination should give rise to
15 this inference.

16 **C. Plaintiff’s Commonwealth Claims**

17 Arroyo alleges violations of parallel rights afforded by the Puerto Rico Civil Code.
18 (Docket No. 1 at 3-4.) Specifically, Arroyo alleges violations of Laws No. 80 and 115
19 and Articles 1802 and 1803 of the Puerto Rico Civil Code. (Id.)

20 We have discretion to decline supplemental jurisdiction over the remaining
21 Commonwealth law claims, since we have dismissed all of the claims over which we
22 have original jurisdiction. See 28 U.S.C. § 1367(c)(3); see also United Mine Workers v.

1 Gibbs, 383 U.S. 715, 726 (1966) (“if the federal law claims are dismissed before trial...
2 the state claims should be dismissed as well.”) In exercising our discretion under
3 § 1367(c), we must consider the issues of “judicial economy, convenience, fairness, and
4 comity.” Che v. Massachusetts Bay Transp. Authority, 342 F.3d 31, 37 (1st Cir. 2003).
5 Having considered these factors, we decline to exercise supplemental jurisdiction over
6 Arroyo’s Commonwealth law claims, and we dismiss them without prejudice.

7 **IV.**

8 **Conclusion**

9 For the foregoing reasons, Structural Steel’s summary judgment motion, (Docket
10 No. 13), is **GRANTED**. Arroyo’s federal law claims are **DISMISSED WITH**
11 **PREJUDICE**. Arroyo’s Commonwealth law claims are **DISMISSED WITHOUT**
12 **PREJUDICE**.

13 **IT IS SO ORDERED.**

14 San Juan, Puerto Rico, this 22nd day of August, 2013.

15 S/José Antonio Fusté
16 JOSE ANTONIO FUSTE
17 U. S. DISTRICT JUDGE